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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09 617,930	08/16/2000	Daniel Schmoutz	008265-0340-999	1428

28765 7590 12/18/2002

WINSTON & STRAWN
PATENT DEPARTMENT
1400 L STREET, N.W.
WASHINGTON, DC 20005-3502

EXAMINER

TRAN LIEN, THUY

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 12/18/2002

11

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/617,930

Applicant(s)

Schmooutz et al.

Examiner

Lien Tran

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on Sept. 30, 2002
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-14 and 29-40 is/are pending in the application.
- 4a) Of the above, claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-14 and 29-40 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claims _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- *See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and or 121.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No.(s): |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No.(s): | 6) <input type="checkbox"/> Other |

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1. Claims 1-14 and 29-40 are rejected under 35 U.S.C. 103(a) as being unpatentable over DE 2746479 for the same reason set forth in paragraph 6 of paper no. 7.
2. In the response filed Sept. 30, 2002, applicant argues Bayer does not disclose all the components of the claimed product because the fat is not the same as claimed. This argument is not persuasive. Bayer does disclose at least 25% by weight of solid fat; the fact that the fat is different from the ones claimed does not take away that the composition does not contain at least 25% fat. Applicant has not shown attached any criticality or unexpected result to the fats claimed. There are many types of fat and the selection of one over the other depends on the taste and flavor desired; there is also an economic factor because one type of fat is cheaper than the other. For example, one person might prefer to use butter when baking a cake; other might choose vegetable oil or shortening. Applicant has not shown that the fat chosen produces a different product from the one disclosed by Bayer. Furthermore, it is well known that chocolate contains cocoa butter and the compositions disclosed by Bayer also contain chocolate which would also raise the amount of cocoa butter present in the compositions. Applicant further argues the different manner in which the claimed components are structured provides a patentable distinction. Applicant has not shown how the claimed product is structurally different. Bayer discloses a fat matrix in which solids are dispersed; thus, it is obvious the fat is in a continuous phase. Applicant further argues Bayer teaches a product that inhibits eating while the claimed product is designed to enhance and increase the consumption of vegetables. The basis for this argument is not clear. The consumption or discourage of consumption is not claimed and

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furthermore, Bayer discloses the product is tastier and more consumer-acceptable; how can this be a teaching of product that inhibits eating. Applicant argues the inclusion of vegetable solids in Bayer is optional and example 1 discloses a confectionery with no vegetable component. One example does not represent the whole teaching of the reference; furthermore, Bayer clearly discloses the inclusion of vegetable solids in the amount of 5-70%. As to the size of the vegetable solids, Bayer discloses varying particle sizes; for example, the dried beet can be used as fine powder and also as coarse-grain material. It would have been obvious to one skilled in the art to use any particle size depending on the taste and texture perception desired. It would also have been obvious to use a combination of vegetable solids depending on the taste desired. The aim of the Bayer composition is to increase fiber intake; thus, it would have been obvious to use any vegetable or combination of vegetables as long as they are high in fiber content. The Bayer product is formed from chocolate because it contains chocolate mass.

3. Applicant's arguments filed Sept. 30, 2002 have been fully considered but they are not persuasive.

4. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period

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will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien Tran whose telephone number is 703-308-1868. The examiner can normally be reached on Wed-Fri. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9310.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

December 15, 2002

Lien Tran
UNIT 1761
GROUP 1700